

## **REMARKS**

Claims 1 and 5 are currently under examination. The currently outstanding office action sets forth rejections based on 35 USC §102(b), and §103. In view of the foregoing amendments and the following remarks, it is respectfully submitted that all of the pending claims are allowable, and reconsideration is respectfully requested.

### **I. Objection To The Specification**

The Examiner had objected to the specification because the disclosure lacks a reference to and brief description of the drawings as set forth in 37 CFR 1.74. In response, Applicants have amended the specification, to inserted a brief description of the drawings. The brief description of the drawings is supported by the specification (see, page 7, line 10 through page 8, line 2 and page 13, lines 3-4) and drawings as filed.

### **II. The Claims Are Not Anticipated, or Rendered Obvious, by the Cited Prior Art**

Claims 1 and 5 are rejected under 35 U.S.C. §102(b) as anticipated by or, in the alternative, under 35 U.S.C. §103(a) as obvious over Jimenez et al. (WO 02/056695A1: “Jimenez”), Ojeda (WO 00/60948A1; “Ojeda”), or Suskovic et al. (Food Technol. Biotechnol., 1997, 35:107-112; “Suskovic”).

According to the Examiner, Jimenez and Ojeda both teach vegetables, such as olives, that have been fermented with *Lactobacillus*. The references teach that the *Lactobacillus* secretes bacteriocin, and thus would provide probiotic benefits. Further, Suskovic is said by the Examiner, to teach that it is known in the art to ferment vegetables, such as olives, with *Lactobacillus* and that *Lactobacillus* has probiotic properties. For reasons detailed below, Jimenez, Ojeda and Suskovic fail to anticipate, or render obvious, the present invention, when considered either alone or in combination.

In order for a reference to anticipate a claim, each and every element of the claim must be disclosed in that one reference. *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565 (Fed. Cir. 1985). “Anticipation under Section 102 can be found only if a reference shows exactly what is claimed. . .” *Structural Rubber Prod. Co. v. Park Rubber Co.*, 749 F.2d 707 (Fed. Cir. 1984).

Further, regarding obviousness, a claim is invalid if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains. 35 U.S.C. § 103(a). The consistent criterion of determination of obviousness is whether the prior art would have suggested to one of ordinary skill in the art that this process should be carried out and would have a reasonable likelihood of success, viewed in light of the prior art. *Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1124 (Fed. Cir. 2000).

The presently claimed invention is directed to table olives characterized in that they contain probiotic bacteria, *i.e.*, lactobacilli and/or bifidobacteria, adhered on their pericarp. The invention is based on the surprising result that ***probiotic bacteria adhere to the pericarp of the olives in levels sufficient to exert a beneficial action on the gastrointestinal tract of a subject.*** Specifically, as set forth in Example 1 of the specification, when olives are stored in brine containing lactobacilli and/or bifidobacteria for three months, ***removed from the brine*** and tested for adherence of bacteria to the pericarp, it is observed that the pericarp allows for tight anchorage of the bacteria. In fact, as demonstrated in Table 1 and Table 2, it is observed that bacteria adhere to the pericarp in amounts ranging from  $5 \times 10^5$  to  $5 \times 10^8$  UFC/gram.

In contrast to the presently claimed invention, both Ojeda and Jimenez merely disclose inoculating the brine in which vegetables products, including olives, are

fermented for the purpose of improving the taste, aroma and quality of the fermented product. Such a result is believed to be due to the production of a bacteriocin called plantaricin S which reduces spoilage and deterioration of the fermented product, i.e., the bacteriocin effects are against the bacteria contaminating the fermentation process. The bacteriocin production that Ojeda and Jimenez teach is not related to probiotic properties. Both Ojeda and Jimenez fail to disclose, or even suggest, that after removal from the inoculated brine, *bacteria adhere to the pericarp of the olives* as required by the presently pending claims. Thus, Ojeda and Jimenez fail to disclose each and every element of the claim as required by the law. Furthermore, this deficiency in the teaching of Ojeda and Jimenez is not found to be supplemented by the teachings of Suskovic. Although Suskovic discloses studies relating to the testing of the resistance properties of *Lactobacillus plantarum L4* to antibiotics, lysozyme, and salts of bile only, Suskovic fails to disclose that such bacteria adhere tightly to the pericarp of olives.

Thus, given the differences between the disclosures of Jimenez, Ojeda and Suskovic and the disclosure of the present invention, the claims simply cannot be anticipated, or rendered obvious, by Jimenez, Ojeda and Suskovic. Applicants maintain that the prior art simply does not disclose, nor would it have suggested to one of ordinary skill in the art, that olives stored in brine containing lactobacilli and/or bifidobacteria would have said bacteria adhered to their pericarp. Thus, Applicants respectfully request withdrawal of the rejections under §102 (b) or §103.

### **CONCLUSION**

It is respectfully submitted that the present application is now in condition for allowance, early notice of which is respectfully requested. The Examiner is invited to contact Applicants' representative to discuss any issue that would expedite allowance of the subject application.

If any fees are required in connection with the filing of this amendment, the Commissioner is authorized to charge any such required fees or to credit any overpayment to Kenyon & Kenyon's Deposit Account No. 11-0600.

Respectfully submitted,

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